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1980

# Pepperidge Farm, Inc. v. the Board of Review, Department of Employment Security, Industrial Commission of Utah, John I. Johnson and Austin C. Molisa : Brief of Plaintiff

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

PEPPERIDGE FARM, INC.,

Plaintiff,

v.

THE BOARD OF REVIEW, DEPARTMENT  
OF EMPLOYMENT SECURITY, INDUSTRIAL  
COMMISSION OF UTAH; JOHN I.  
JOHNSON; and AUSTIN C. HOLISA,

Defendants.

Case No. 16655

BRIEF OF PLAINTIFF

ORIGINAL ACTION TO REVIEW THE PROCEEDINGS AND  
ORDER OF THE BOARD OF REVIEW, DEPARTMENT OF EMPLOYMENT  
SECURITY, INDUSTRIAL COMMISSION OF UTAH

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FILED

OCT 26 1979

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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PEPPERIDGE FARM, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE BOARD OF REVIEW, DEPARTMENT	)	Case No. 16655
OF EMPLOYMENT SECURITY, INDUSTRIAL)	)	
COMMISSION OF UTAH; JOHN I.	)	
JOHNSON; and AUSTIN C. NOLISA,	)	
	)	
Defendants.	)	

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BRIEF OF PLAINTIFF

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ORDER OF THE BOARD OF REVIEW, DEPARTMENT OF EMPLOYMENT  
SECURITY, INDUSTRIAL COMMISSION OF UTAH

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IN THE SUPREME COURT OF THE  
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COMMISSION OF UTAH; JOHN I.	)	
JOHNSON; and AUSTIN C. NOLISA,	)	
	)	
Defendants.	)	

---

BRIEF OF PLAINTIFF

---

NATURE OF THE CASE

This is an action before the Supreme Court of the State of Utah seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which determined claimants John I. Johnson and Austin C. Nolisa to be qualified to receive unemployment benefits from December 17, 1978 to January 27, 1979.

DISPOSITION AND PROCEEDINGS BELOW

Defendant-claimants John I. Johnson and Austin C. Nolisa filed claims for unemployment compensation which were granted by representatives of the Department of Employment Security. The decision entitling claimants to receive benefits

was, following plaintiff's timely appeal, reversed by the Appeal Referee. The defendant-claimants appealed and the Board of Review of the Industrial Commission of Utah reversed the decision of the Appeal Referee and reaffirmed the decision of the Department Representative allowing the defendant-claimants to receive unemployment benefits. Plaintiff's Petition for Reconsideration and Request for Oral Argument was denied by the Board of Review.

#### RELIEF SOUGHT ON REVIEW

Plaintiff petitions this court to reverse the decision of the Board of Review, Department of Employment Security, Industrial Commission of Utah and determine that defendant-claimants John I. Johnson and Austin C. Nolisa were ineligible to receive unemployment benefits from December 19, 1978 to January 27, 1979, and that the overpayments received by said claimants be repaid or deducted from future unemployment benefits received.

#### STATEMENT OF THE FACTS

John I. Johnson and Austin C. Nolisa voluntarily terminated their employment with Pepperidge Farm, Inc. on September 23, 1978. Mr. Johnson had been employed by plaintiff since June, 1976 while Mr. Nolisa had been in plaintiff's employ since March, 1976. At the time of their voluntary termination, both claimants were employed full-time and held the position of Plant Services "B" employees at a wage of \$4.25 per hour.



Pepperidge Farm began manufacturing operations in Richmond, Utah in 1974. Job classifications were established according to the practices of other Pepperidge Farm plants in other areas of the country. As the plant management became acquainted with its own operations and employment needs, it became apparent that some job reclassifications were necessary.

A management committee reviewed job responsibilities in August, 1977, and certain employee positions were reclassified. At the time of this review, claimants Johnson and Nolisa were employed on the afternoon shift as Plant Services Helpers. As a result of the committees review, the job classification of Plant Services Helper was divided into two separate groups or job classifications: "Plant Services A" and "Plant Services B". The "A" group was given higher pay due to their greater responsibilities.

When reclassification occurred, claimants Johnson and Nolisa were not working the same shift as those employees reclassified as Plant Services "A". Consequently, the defendant-claimants remained in the Plant Services "B" group and their wages were not increased since their responsibilities were different from those in the "A" group. Claimants requested a reconsideration of their positions on two separate occasions. Both times the committee determined that the distinction between the job classifications of Plant Services "B" and Plant Services "A" employees was proper and appropriate.

On at least five separate occasions subsequent to the job reclassifications, both claimants had an opportunity to bid for the position of Plant Services "A". Neither claimant made any effort to bid for this position and consequently, both remained in group "B".

On August 29, 1978 claimants Johnson and Nolisa were both disciplined for failure to carry through or accept direction from their supervisors. Claimant Johnson was suspended for two days without pay for insubordination. Claimant Nolisa was suspended for five days without pay.

At the time of his suspension, Nolisa informed plaintiff that he was going to quit anyway to go back to school and that he planned to terminate on September 23, 1979. Claimant Johnson also gave notice at the time of his suspension of his intent to voluntarily terminate on September 23, 1979, stating that he also was returning to school.

Subsequent to their suspension, both claimants returned to their regular employment until they voluntarily quit on September 23, 1979 as planned. When presented with discharge slips which indicated their reason for terminating as "quitting to return to school", both claimants refused to accept the discharge slips and requested that they be rewritten to state that the claimants had "resigned", which plaintiff did.

The defendant-claimants filed claims for unemployment benefits with the Utah Department of Employment Security during the month of November, 1978, requesting eligibility for

benefits from the date of their voluntary termination of employment with plaintiff. A Department Representative of the defendant-Industrial Commission determined both claimants eligible to receive unemployment compensation effective December 17, 1978 on the grounds that their separations were not disqualifying.

Upon learning that the defendant-claimants had applied for unemployment benefits and had been determined eligible to receive compensation, plaintiff appealed the decision of the Department Representative. A hearing with the Appeal Referee in the Appeals Office of the Industrial Commission of Utah, Department of Employment Security, was held in Logan, Utah on February 8, 1979.

The Appeal Referee determined that claimants Johnson and Nolisa had voluntarily terminated their employment with plaintiff without good cause and had received unemployment benefits to which they were not entitled. The Appeal Referee reversed the decision of the Department Representative and determined that both claimants were disqualified from receiving unemployment compensation from December 17, 1978 to January 27, 1979 pursuant to Section 35-4-5(a) of the Utah Employment Security Act. The reversal also provided that the overpayments received by the defendant-claimants would be deducted from any future unemployment benefits received by them after January 27, 1979.

The defendant-claimants appealed the decision of the Appeal Referee to the Board of Review, Industrial Commission of Utah, and submitted to the Board of Review a Memorandum of Points and Authorities dated March 27, 1979, a Motion for Admission of Affidavits dated March 22, 1979, and Affidavits dated March 14, 1979. Plaintiff filed a Responsive Memorandum with the Board of Review dated May 18, 1979, in addition to a Notice of Right Reserved to File Counter Affidavits dated May 18, 1979, and an Affidavit dated May 25, 1979.

The Board of Review in a split decision, James F. Hannon dissenting, reversed the decision of the Appeal Referee and affirmed the decision of the Department Representative in ruling that the defendant-claimants voluntarily left work with good cause and were eligible to receive unemployment benefits effective December 17, 1978. The Board of Review declined to reconsider its decision despite plaintiff's Petition for Reconsideration and Request for Oral Argument dated July 18, 1979.

## ARGUMENT

### POINT I

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT  
CLAIMANTS HAD GOOD CAUSE FOR VOLUNTARILY  
TERMINATING THEIR EMPLOYMENT WITH PLAINTIFF

The Utah Supreme Court has held on more than one occasion that where a decision of the Industrial Commission concerning the right of a claimant to receive unemployment compensation is unsupported by substantial evidence, a reversal

of the order is appropriate. Martinez v. Board of Review,  
Department of Employment Security, 25 Utah 2d 131, 477 P.2d 587  
(1970); Kennecott Copper Corp. Employees v. Department of  
Employment Security, 13 Utah 2d 262, 372 P.2d 987 (1962).  
Indeed, a reversal of the decision of the Board of Review,  
Industrial Commission of Utah is justified in the instant case.

Although the defendant-claimants maintain that their  
voluntary termination of employment with Pepperidge Farm was  
justified and not disqualifying, the evidence on record fails  
to support a finding that claimants Johnson and Nolisa quit  
their employment with good cause.

Claimants have alleged that they were forced to  
terminate their employment with plaintiff and that they were  
harrassed and mistreated by plaintiff. (R. 00068, 00069,  
00070, 00072, 00073, 00074). The evidence, however,  
establishes that the defendant-claimants were not forced to  
quit their jobs but rather terminated their employment with  
plaintiff voluntarily and of their own free will.

After quitting their jobs with plaintiff, both  
claimants filed with the defendant-Industrial Commission to  
receive unemployment benefits. The claims for benefits  
submitted by defendants Johnson and Nolisa did not state that  
they were forced to leave plaintiff's employment. Not only did  
the claimants make no mention of the now alleged harrassment  
and mistreatment, but both claimants indicated on their claims  
for unemployment benefits that their reason for unemployment  
was simply that they "Quit". (R. 00123, 00124).

The defendant-claimants voluntarily terminated their employment with plaintiff in order to return to school, not because of any pressure, harrassment, mistreatment or force on the part of plaintiff. Both claimants, well in advance of their termination date, informed plaintiff that they were quitting to return to school. (R. 00038, 00082, 00085, 00091, 00101).

Claimant Johnson commenced work for plaintiff in June, 1976 as a Plant Services Helper, later reclassified as a Plant Services "B" employee. (R. 00038, 00042, 00067, 00068). In August, 1978, Johnson was suspended for two days without pay for insubordination. (R. 00037, 00042). At the time of his suspension he stated that he was "going to quit." When asked why, he responded, "I am going back to school." Johnson stated that his last day of employment with plaintiff would be September 23, 1979. (R. 00042, 00082, 00085, 00091).

Claimant Nolisa began working for plaintiff in May, 1976 as a production worker and later became a Plant Services Helper, reclassified as a Plant Services "B" employee. (R. 00038, 00043, 00072). Nolisa was insubordinate to his foreman on August 28, 1978 and was suspended for five days without pay. (R. 00037, 00072, 00073). At the time of his suspension, Nolisa informed plaintiff that he was quitting anyway and planned to leave September 23, 1978 in order to return to school. (R. 00037, 00038, 00043, 00091).

That the defendant-claimants voluntarily terminated their employment with plaintiff so that they could return to school was further pointed out by the testimony of Dale Stokes, Personnel Manager of Pepperidge Farm, at the hearing with the Appeal Referee on February 8, 1978:

On August 29, 1978, both John Johnson and Austin Nolisa gave notice to Pepperidge Farms of their impending termination. They both stated at that time, they would be resigning. Their last day of work would be September 23, 1978. Their resignation was due to the fact that they were going to return to school on a full-time basis. On September 23, 1978, they did in fact work their last day.

(R. 00091).

Following their suspension, claimants returned to their work and continued working their regular shifts until September 23, 1978 when they both quit as they had planned. When the defendant-claimants were presented with their discharge slips upon termination, which indicated that they were "quitting to return to school", claimants Johnson and Nolisa refused to accept their discharge slips and requested plaintiff to rewrite them to indicate that they had "resigned", which plaintiff did. (R. 00042, 00043).

The discharge slips prepared by plaintiff stated that the defendant-claimants were quitting to attend school since that was the reason plaintiff had been given by Johnson and Nolisa. Concerning the circumstances of the claimants' separation, the testimony of Dale Stokes during the hearing with Appeal Referee is relevant:

Referee Now, then since we have played the record prior to the claimant and claimant's representative being sworn in, what had occurred prior to their entry into the hearing, we will allow Mr. Stokes to continue at this time as to the circumstances of the individuals' separation and why they are appealing.

Stokes Because September 23, 1978 was on a Saturday, and is their last of work, both Mr. Johnson and Mr. Nolisa were scheduled for exit interviews, as is normal procedure by the company, on Friday, September 22. When they came in for the exit interview, they were given the Utah Department of Employment Security Separation Notices, as required by law. Each of them refused to accept the notice, stating that they did not wish to have it written as it was presented to them, in that it said that their reason for leaving was to go to school. Mr. Nolisa said that his first reason was, "he is tired of the discriminatory attitude in the plant." And secondarily, that he was going to return to school. The company had no knowlegde of this contention prior to that time. Mr. Johnson made no statement whatsoever. Subsequent to the termination in September of 1978, both claimants filed for unemployment compensation. The Notice of Claim Filed states that the claimant reports the reason for separation from your firm as "I left." That is true of both statements. Again, the claimants this time gave no reason for termination. It is the company's contention that they left voluntarily without good cause for resignation and without compensable cause for resignation. That is the only question in this hearing so far as the company is concerned.

(R. 00091).

The defendant-claimants have not denied that they informed plaintiff they were quitting to return to school, and the fact that plaintiff prepared discharge slips for the claimants indicating that they were quitting to attend school is relevant to plaintiff's belief that claimants Johnson and Nolisa voluntarily left their jobs for that sole purpose, as was pointed out by the Appeal Referee during the hearing:



Green . . .The blue slip, in which I saw, you know, glanced at said, "To attend school.", you know, but based upon that contention, when the claimant was going to school for the whole of, still are going to school, then, you know, well, it is irrelevant to me.

Referee No, that is not necessarily irrelevant. This was the reason that they gave the employer that they were leaving at that time. That becomes, then, the reason he puts down.

Green Okay. And if that is the reason that he put down arbitrarily, and they didn't accept the blue slip for, it is also my contention that, because they did not accept the blue slip, it wasn't right.

Referee That doesn't change the fact that they both went to school, does it?

(R. 00100, 00101). (Emphasis supplied).

That the claimants voluntarily quit their jobs with plaintiff to return to school is supported by more than substantial evidence. Both claimants informed plaintiff that they were quitting to return to school. (R. 00091). Both gave notice that they intended to quit well in advance of their actual termination date, indicating that their decision to leave was preplanned rather than the result of any force or harrassment by plaintiff. (R. 00042, 00043, 00082, 00085, 00091). Claimants Johnson and Nolisa both terminated their employment with plaintiff on the exact day they had stated they would. (R. 00091, 00092). The claims for unemployment benefits submitted by both claimants to the defendant-Industrial Commission stated only that they had "Quit". (R. 00123, 00124). Furthermore, the discharge slips prepared by plaintiff for the defendant-claimants upon their

termination indicated that both claimants were "quitting to return to school", as plaintiff had been told that they were. (R. 00091, 00100, 00101). Finally, both claimants began to attend school at Utah State University in Logan, Utah on a full-time basis on September 26, 1978, the Tuesday following the day they quit. (R. 00092).

Despite the overwhelming evidence that claimants Johnson and Nolisa voluntarily quit to return to school, they claim that they quit due to unsatisfactory working conditions, consisting of their failure to obtain the status of Plant Services "A" employees. The record however, shows that the reclassification claimants complain of occurred at least sixteen months prior to their termination (R. 00031, 00033, 00096) and that pursuant to the request of Johnson and Nolisa, plaintiff on two separate occasions reconsidered the reclassifications only to determine that they were proper and appropriate and that no changes were necessary. (R. 00039).

The record further establishes that all of plaintiff's employees in the Plant Services "B" category, including the defendant-claimants, received the same hourly wage. (R. 00038, 00097). Although the Plant Services "A" employees received a higher wage, their responsibilities require greater skills and abilities than those required of the Plant Services "B" employees, such as the disassembly and assembly of machines and equipment for cleaning purposes. (R. 00039, 00043).

Furthermore, the defendant-claimants each had the opportunity on at least five separate occasions to bid for the position of Plant Services "A" employee, yet neither claimant made any effort to do so. (R. 00039, 00044, 00099).

The defendant-claimants voluntarily terminated their employment with plaintiff without force, harrassment or mistreatment. Both claimants left for the purpose of returning to school which they did. Furthermore, the job reclassification complained of by claimants was proper and necessary and within the province of the plaintiff-employer. Therefore, the evidence does not support a finding that claimants Johnson and Nolisa terminated their employment with good cause, and the decision of the Board of Review should be reversed.

## POINT II

### SECTION 35-4-5(a) OF THE UTAH EMPLOYMENT SECURITY ACT DISQUALIFIES CLAIMANTS FROM RECEIVING UNEMPLOYMENT BENEFITS FROM DECEMBER 17, 1978 to JANUARY 27, 1979

Section 35-4-5(a), Utah Code Annotated 1953, as amended provides:

An individual shall be ineligible for benefits for the purposes of establishing a waiting period:

(a) For the week in which the claimant left work voluntarily without good cause, if so found by the commission, and for each week thereafter until the claimant has performed services in bona fide covered employment and earned wages for such services equal to at least six times the claimant's weekly benefit amount; provided, that no claimant shall be ineligible for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

In the instant case, the defendant-claimants did not have good cause for voluntarily leaving their work with plaintiff.

A. Claimants Terminated Employment to Return to School

In Logan-Cache Knitting Mills v. Industrial Commission, 99 Utah 1, 102 P.2d 495 (1940), the Court enforced subdivision (a) of Utah Code Annotated § 35-4-5 in determining a claimant to be ineligible for unemployment benefits where it was established that he had left his job without good cause. The meaning of "good cause" as it applies to Section 35-4-5(a) has been discussed by the Utah Supreme Court. In Denby v. Board of Review of Industrial Commission, 567 P.2d 626 at 630 (Utah 1977), this Court stated:

The initial determination of "good cause," for voluntarily leaving employment, is a mixed question of law and fact for the administrative agency. A claimant has the burden of showing good cause for leaving, when he voluntarily terminates suitable employment. "Good cause" has been defined as "such cause as would similarly affect persons of reasonable and normal sensitivity, and is limited to those instances where the unemployment is caused by external pressures so compelling that a reasonably prudent person, exercising ordinary common sense and prudence, would be justified in quitting under similar circumstances." (Emphasis supplied).

See also Miles v. Gronning, 581 P.2d 1334, 1338-1339 (Utah 1978).

It has been stated that the purpose of the Utah Employment Security Act is "to establish financial reserves for the benefit of persons unemployed through no fault of their

own." Alvord v. Board of Review of Industrial Commission, 1 Utah 2d 388, 267 P.2d 914 (1954). Although no Utah case appears to be on point, other jurisdictions applying similar unemployment statutes have repeatedly held that the unemployment system cannot be used to subsidize an employee's education.

In Keisling v. Unemployment Compensation Board of Review, 181 A.2d 717 (Pa. 1962), the claimant had terminated his employment to allow him to complete his last year of school. In ruling that the claimant was disqualified from receiving unemployment benefits, the court on page 718 of its opinion stated:

However praiseworthy we may consider the thirst for knowledge to be, it has become abundantly clear that leaving employment to further one's education does not constitute leaving work for a cause of necessitous and compelling nature.

The case of Fenstersheib v. Unemployment Compensation Board of Review, 124 A.2d 375 (Pa. 1956), also involved a claimant who had voluntarily left his employment to return to school. In ruling against the claimant, the court on page 376, proclaimed:

While the desire to attend school is a laudable one, the termination of employment for that reason cannot be deemed "good cause".

In Perales v. Department of Human Resources Development, 32 Cal.App. 3d 338, 108 Cal. Rptr. 167, 171 (1973), the court held that voluntarily terminating ones

employment to return to school does not constitute "good cause" as required by the unemployment insurance system:

Turning to the facts of the case at bench, we cannot say that quitting a job to attend school, no matter how personally commendable the step may be, is an imperative and compelling reason of such magnitude as to render the claimant eligible for unemployment benefits, at least in the absence of explicit legislative authority. If this were good cause within the meaning of section 1256, untold numbers of persons could quit their jobs to attend school while receiving unemployment compensation benefits. However great may be society's interest in furthering a working man's education, we find nothing in the Unemployment Insurance Law to sanction this objective. . . . The unemployment insurance system cannot be used to subsidize an employee's education. (Emphasis supplied).

Other cases holding that leaving work to return to school does not satisfy the "good cause" requirement are Zook v. Unemployment Compensation Board of Review, 188 A.2d 783 (Pa. 1963); Dreistadt v. Catherwood, 286 N.Y.S.2d 921, 29 A.D. 2d 807 (1968); and Christophe v. Levine, 375 N.Y.S.2d 483, 50 A.D.2d 705 (1975).

In the instant case, claimants Johnson and Nolisa voluntarily left their work with plaintiff to return to school. As was pointed out above, the defendant-claimants informed plaintiff well in advance that they were quitting to return to school. (R. 00042, 00082, 00091). Both claimants terminated their employment with plaintiff on the date they had stated they would. (R. 00091, 00092). The discharge slips prepared for claimants by plaintiff indicated that both Johnson and Nolisa had quit to return to school (R. 00091, 00100,

00101), and both claimants returned to school only three days after they quit. (R. 00092).

Claimants maintain that they did not leave to return to school since they had been attending school during the entire period of their employment with plaintiff. (R. 00069, 00073). However, neither claimant had been attending school during the summer of 1978, nor were they enrolled at the time they informed plaintiff of their intended termination. That the defendant-claimants did quit work to return to school is further supported by the fact that in January, 1978, claimant Nolisa requested a leave of absence from plaintiff's employment to attend school, and did take such a leave of absence from January 10, 1978 to March 15, 1978.

The Appeal Referee's decision dated February 15, 1979 stated:

On September 9, 1978, the claimants both advised their employer that they were quitting on September 23, 1978. It was the employer's understanding that the claimants were quitting to attend school.

The claimants worked swing shift and had been attending school during the time they worked for Pepperidge Farms. They entered school Fall Quarter 1978 and are both attending at the present time.

The reasoning of the Appeal Referee was supported by substantial evidence that the claimants voluntarily terminated their employment with plaintiff for the sole purpose of returning to school. (R. 00085, 00086).

During the hearing with the Appeal Referee, the claimants themselves expressly admitted that they were returning to school:

Referee Now, then, it is indicated that you, uh, Mr. Nolisa were returning to school. Is this correct?

Nolisa No, it wasn't. Uh, Dale, these people wrote that up. I wasn't there. I was just told them. I was invited in the plant manager's office.

Referee Now, excuse me, I have a form here completed on January 9, 1979 showing that you are enrolled, starting at Utah State University in September of '76 and plan to complete in 1980.

Nolisa Yeh.

Referee Did you attend school in Fall Quarter?

Nolisa Yeh. Even when I was working for Pepperidge Farm, I was attending school full time.

Referee You were attending school during the Summer Quarter also?

Nolisa No, during the summer quarters, I don't attend school.

Referee Well, that's what I say, you quit September 23 and school doesn't start until about that time, about September 26.

Nolisa Yeh.

Referee Did you enter school on September 26?

Nolisa Yes, I did.

Referee All right. Now, I would ask the same question, Mr. Johnson. Did you enter school on September 26?

Johnson Yes, I did.

(R. 00092). (Emphasis supplied).



Since the defendant-claimants quit their jobs with plaintiff to return to school and voluntary termination of employment for that purpose does not constitute "good cause" pursuant to the requirements of section 35-4-5(a), Utah Code Annotated 1953, as amended, claimants terminated their employment without good cause and the decision of the Board of Review is in error and must be reversed.

B. Claimants' Unsuccessful Efforts To Be Reclassified Does Not Constitute Good Cause For Leaving Work

Plaintiff's manufacturing operations in Richmond, Utah began in 1974. Job classifications were made according to the practices of other Pepperidge Farm plants in other parts of the country. In 1977 plaintiff determined that job reclassifications were necessary and a committee of management reviewed job responsibilities and reclassified certain employee positions. One position affected by the reclassification was that of Plant Services Helper. This job was separated into two groups: Plant Services "A" and Plant Services "B". The "A" group received higher pay due to their greater responsibilities. (R. 00038).

Claimants Johnson and Nolisa were employed as Plant Service Helpers at the time of the reclassification. When reclassification was instigated, neither claimant was working the same work shift as those employees reclassified as Plant Services "A". Consequently, both claimants remained in the

Plant Services "B" category and their salary was not increased. (R. 00098, 00099).

Claimants contend that plaintiff's refusal to reclassify them as Plant Services "A" employees constituted good cause for terminating their employment with plaintiff. (R. 00062, 00068, 00072). Claimants, however, were not justified in leaving work due to their failure to be reclassified since: (1) the reclassification was justified and necessary; (2) the employees in group "A" received a higher wage due to their greater responsibilities; (3) claimants received the same salary as all other employees in the "B" group; (4) plaintiff reevaluated claimants job classifications on two separate occasions only to determine that they were proper and appropriate; and (5) claimants had the opportunity to bid for the position of Plant Services "A" on at least five separate occasions.

During the hearing with the Appeal Referee, the Referee noted that the manner in which an employer assigns its jobs is entirely within the province of the employer. (R. 00098). Despite that province, the reclassification of Plant Services to groups "A" and "B" was necessary and the higher wages paid to the group "A" employees were justified because of their greater responsibilities. As stated by Dale Stokes in his affidavit dated May 25, 1979:

There are distinct and specific responsibilities to a Plant Services "A" classification that differ in

skill, ability and responsibility than a Plant Services "B" employee. Particularly, for example an "A" classification includes disassembly and assembly of equipment and machines for cleaning purposes.

(R. 00039).

Not only were their responsibilities different from those of the Plant Services "A" employees, but claimants Johnson and Nolisa did the same work and received the same pay as all other employees in the "B" group. (R. 00038, 00097). Furthermore, at the request of claimants, the reclassification of the Plant Service Helpers into groups "A" and "B" was reviewed by plaintiff in January, 1978, and in August, 1978. On both occasions plaintiff determined that the distinction between Plant Services "A" employees and Plant Services "B" employees was proper and that no change should be made in that classification. (R. 00039, 00043, 00044).

That the defendant-claimants failure to obtain reclassification was not good cause for leaving the employment of plaintiff is further supported by the fact that claimants failed to file a formal grievance with plaintiff regarding the job classifications. Plaintiff's employee's manual, at page 18 (R. 00025), provides the appropriate procedure to be followed for complaints and problems. Claimants failed to follow those procedures concerning their complaints about the distinctions between the group "A" and "B" positions. (R. 00021).

The merits of claimants allegations that they were justified in quitting because of their classification as Plant

Services "B" employees was addressed by the Appeal Referee in his decision as follows:

There is good cause for the voluntary leaving of work where the facts disclose a real, substantial and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

In the present instance the main thrust of the claimants' testimonies concerned the grievances they felt resulted from their employment situation. They considered their attendance at school to be secondary since they had attended school before while working at Pepperidge Farms.

The claimants were being paid the same rate as others assigned to the work they were doing and, while they may have felt others were being given preferential treatment, they had filed a grievance through the proper channels for redress. It is considered that they reasonably could have been expected to continue their employment until such time as the issues had been decided rather than quitting to become totally unemployed without prospects of other work.

(R. 00083, 00086). (Emphasis supplied).

James F. Hannan, dissenting in the Board of Review's decision, also recognized that the voluntary termination by the defendant-claimants of their employment with plaintiff due to their complaints about the job classifications did not constitute a real, substantial and compelling reason of such a nature that reasonable persons genuinely desirous of retaining employment would also have quit. Mr. Hannan stated:

I respectfully dissent on the grounds that the claimant chose to remain employed for 16 months after the job classification issue arose. It appears, therefore, that his decision to terminate was motivated by something other than the job conditions.

(R. 00031, 00033). (Emphasis supplied).

Perhaps the most convincing evidence that the claimants' unsuccessful efforts to be reclassified as Plant Services "A" employees did not constitute "good cause" for quitting their jobs is the fact that on at least five separate occasions, both claimants had the opportunity to bid for that position and neither Johnson nor Nolisa made any effort to do so. (R. 00039).

Concerning the failure of the defendant-claimants to bid for the position of Plant Services "A" employee, the testimony of Mr. Dale Stokes at the hearing with the Appeal Referee is enlightening:

Referee Well, I will ask him the question concerning that. Is this a company policy to allot jobs on seniority, Mr. Stokes?

Stokes It is. When the jobs were created, they were offered on a seniority basis to those people who were working on the night owl shift.

Referee On the night shift?

Stokes That's correct.

Referee Was that where thses (sic) gentlemen were employed?

Stokes They were employed on the afternoon, p.m. shift; however, on at least five different occasions subsequent to the reevaluation of the job, the job was posted for bid. On none of those occasions did either gentlemen bid.

Referee In other words, the job was posted for bidding on the bulletin board?

Stokes That's correct.

(R. 00098, 00099). (Emphasis supplied).

Mr. Stokes testified further:

Stokes       Jobs were posted on the board in the normal process of our bidding procedure --

Nolisa       Are they sent there, are they sent about eight months or nine months, when they sent out them?

Referee      Excuse me, Mr. Nolisa, will you allow him the courtesy of completing his statement before you interrupt him?

Nolisa       I will.

Referee      All right, fine. Now, Mr. Stokes has been talking and let him finish his statement concerning that, please.

Stokes       When the jobs came open, became available.

Referee      When the jobs were available so you were going to hire somebody for those positions?

Stokes       Right. Then they were posted in various [places] conspicuous to all employees for a minimum of 48 hours before the job was actually filled. Employees desiring to bid onto those jobs were requested to follow the normal bid procedure which is to indicate their desire to have the job by filling out a book in personnel or giving a note to personnel.

Referee      And on no occasion was that done by either Mr. Johnson or Nolisa, to your knowledge?

Stokes       That is correct.

(R. 00099, 00100). (Emphasis supplied).

A consideration of the above factors, including the fact that both claimants could have become Plant Services "A" employees had they only bid for that position on one of the many occasions it was posted for bidding, makes it clear that the claimants' dissatisfaction with their working conditions in addition to their failure to obtain the classification of Plant Services "A" employees did not constitute good cause for

voluntary termination of their employment. Accordingly, the decision of the Board of Review determining claimants to be eligible for unemployment benefits from December 17, 1978 to January 27, 1979 should be reversed.

C. Justified Reprimand By Employer Does Not  
Constitute Good Cause For Voluntary Termination

Section 35-4-5(a) Utah Code Annotated 1953, as amended, disqualifies a claimant from receiving unemployment compensation where the claimant-employee terminates his employment because of a justified reprimand by his employer for misconduct. Although no Utah case appears to be on point, other jurisdictions addressing the issue have consistently held such a termination to be without good cause.

In Barajas v. Industrial Commission, 487 P.2d 598 (Colo. 1971), the Court ruled that the claimant was disqualified from receiving unemployment benefits after he quit because he refused to be laid-off for ten days as discipline for his "excessive absenteeism and tardiness and for failure to punch the time clock."

The case of Nenoff v. Culligan Soft Water, 542 P.2d 837 (Idaho 1975), involved a claimant who had left his employment rather than accept his employer's restriction of denying him access to the office at night. The Industrial Commission denied the claimant unemployment benefits because he had voluntarily left his employment without good cause. On

review, the Idaho Supreme Court affirmed the decision of the Industrial Commission. See also, Unemployment Compensation Board of Review v. Tune, 350 A.2d 876 (Pa. 1976), where it was held that voluntary termination of ones employment because of being suspended does not entitle the claimant to recover unemployment compensation.

Claimants Johnson and Nolisa were disciplined on August 31, 1978 for insubordination. Johnson was suspended for two days without pay and Nolisa for five days. (R. 00037). Although claimants allege that they were treated unfairly, both claimants were justifiably reprimanded under the circumstances, since they refused to perform a job which was no different from jobs requested to be done and performed by them on numerous other occasions during the sixteen month period following the job reclassification. (R. 00020, 00021).

The defendant-claimants voluntarily terminated their employment with plaintiff. Their notice of termination occurred immediately following their suspension without pay for insubordination. The discipline imposed by plaintiff was justified and claimants' termination of their employment in retaliation to that discipline was without good cause. Consequently, the order entitling the defendant-claimants to receive unemployment compensation from December 17, 1978 to January 27, 1979 must be reversed.



### CONCLUSION

For the reasons stated above, the decision of the Appeal Referee determining the defendant-claimants to be ineligible to receive unemployment benefits from December 17, 1978 to January 27, 1979 and establishing an overpayment of compensation to claimants should be affirmed, and the decision of the Board of Review, Department of Employment Security, Industrial Commission of Utah, should be reversed.

Respectfully submitted this 26<sup>th</sup> day of October, 1979.

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### CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing BRIEF OF PLAINTIFF to Floyd Z. Astin & K. Alan Zabel, Special Assistants to the Attorney General for the Industrial Commission of Utah, Department of Employment Security, 174 Social Hall Avenue, Salt Lake City, Utah, 84147, and to Michael E. Bolson, Attorney for Claimants, Utah Legal Services, Inc., 385-24th Street, Suite 522, Ogden, Utah 84401, postage prepaid on this 26 day of October, 1979.

FABIAN & CLENDENIN

By Daniel W. Anderson  
Daniel W. Anderson